(1) No. 96-961462 MAR 17 1997

IN THE

Supreme Court of the United States

OCTOBER TERM 1996

CHRISTOPHER H. LUNDING,
BARBARA J. LUNDING,

Petitioners,

—v.—

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court below err in holding that New York Tax Law Section 631(b)(6), which discriminates against nonresidents of New York who pay New York State income tax by expressly denying them entirely a tax deduction for alimony payments which New York residents are allowed fully to take, does not violate the Privileges and Immunities Clause (Article IV, Section 2) of the United States Constitution?

PARTIES TO THE PROCEEDING

Respondents the Tax Appeals Tribunal of the State of New York and the Commissioner of Taxation and Finance of the State of New York were the Respondents-Appellants below. Petitioners Christopher H. Lunding and Barbara J. Lunding were the Petitioners-Appellees below.

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PETITION FOR A WRIT OF CERTIORARI TO
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PETITION FOR WRIT OF CERTIORARI

Petitioners Christopher H. Lunding and Barbara J. Lunding ("Petitioners") respectfully petition for a Writ of Certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York below, dated December 18, 1996, is reported at 89

N.Y.2d 283, 675 N.E.2d 816, 653 N.Y.S.2d 62 (1996); App. 1a.[1] The opinion of the Appellate Division of the Supreme Court of the State of New York—Third Department below, dated March 14, 1996, is reported at 218 A.D.2d 268, 639 N.Y.S.2d 519 (3d Dep't 1996); App. 11a. The Decision of the Tax Appeals Tribunal of the State of New York below, dated February 23, 1995, is reproduced at App. 16a. The Determination of the Administrative Law Judge of the State of New York—Division of Tax Appeals below, dated April 28, 1994, is reproduced at App. 25a.

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on December 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case invokes the Privileges and Immunities Clause, U.S. Const. Article IV, Section 2, which provides that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The statute which Petitioners seek to have declared unconstitutional is Section 631(b)(6) of the New York Tax Law, which provides that "The deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources."

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[1] "App." refers to the appendix filed with this Petition for a Writ of Certiorari.

STATEMENT

This Petition seeks certiorari to review a judgment of the Court of Appeals of the State of New York, that State's highest court, which held that Section 631(b)(6) of the New York Tax Law ("Section 631(b)(6)") was not unconstitutional under the Privileges and Immunities Clause, the Commerce Clause or the Equal Protection Clause of the United States Constitution. In this Petition, only review under the Privileges and Immunities Clause is sought.

The procedural history of the case is correctly summarized in the opinion below of the Court of Appeals of the State of New York. Challenges to Section 631(b)(6) on federal constitutional grounds explicitly were raised by Petitioners at all administrative review levels of the proceedings below, as well as in all proceedings in the courts below. *See Lunding v. Tax Appeals Tribunal*, 89 N.Y.2d 283, 285-86 (1996) ("Lunding II"), reproduced at App. 1a; *Lunding v. Tax Appeals Tribunal*, 218 A.D.2d 269, 269-70, 639 N.Y.S.2d 519, 519-20 (3d Dep't 1996) ("Lunding I"), reproduced at App. 11a; Determination of Administrative Law Judge in *In re Lunding*, DTA No. 810921 (April 28, 1994) ("ALJ Determination") at 1, reproduced at App. 16a. Indeed, it has been stipulated that if Section 631(b)(6) is constitutional, the Lundings owe additional New York State income tax and if it is not, they do not. ALJ Determination at 3, ¶6, reproduced at App. 25a.

The relevant facts are quite simple, and are set out in the court opinions below. In 1990, Petitioner Christopher H. Lunding was a partner in a New York City law firm, and derived substantial income in New York from his law practice there. Petitioners were residents in that year of the State of Connecticut and therefore timely filed a joint nonresident New York State personal income tax return. In 1990, Mr. Lunding paid $108,000 of alimony to a former spouse; and Petitioners took a deduction on their 1990 New York nonresident income tax return for $51,934, or 48.0868% of that

alimony. This percentage represented the percentage of Petitioners' total 1990 income earned in New York. Petitioners' deduction for alimony paid was denied solely on the basis of Section 631(b)(6), which provides that "The deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources." Because of the denial of this alimony deduction, Petitioners' income for New York purposes was increased by a like amount ($51,934), resulting in an assessment for additional 1990 New York State income tax in the amount of $3,724, plus interest. *See Lunding II*, 89 N.Y.2d at 285, App. 2a; ALJ Determination at 3, Paragraph 5, App. 27a. It is conceded that residents of New York State are allowed to deduct the entire amount of alimony paid in a given year in determining their taxable income for New York State income tax purposes.

In order to appreciate fully the genesis and context of the matters raised in this Petition for a Writ of Certiorari, it is necessary to understand the events which led to the passage of Section 631(b)(6), which was added to the New York Laws in 1987. It is indisputable that there is not one word of legislative history for this statute, *Lunding I*, 218 A.D.2d at 271, 639 N.Y.2d at 521, reproduced at App. 14a. Indeed, until Petitioners commenced these proceedings, the only intended purpose for it ever advanced by any instrumentality of the State of New York was in an advisory opinion of the New York State Tax Commissioner in *In re Rosenblatt*, [1989-1990 Transfer Binder] N.Y. St. Tax Rep. (CCH) ¶252-998, at 17,968 (Jan. 18, 1990), in which it was declared that Section 631(b)(6) was intended "specifically [to] revers[e] *Friedson [sic] v. State Tax Commission*, 64 N.Y. 76 (1984)."

The case referred to is *Friedsam v. State Tax Commission*, 98 A.D.2d 26, 470 N.Y.S.2d 848 (3d Dep't 1983), *aff'd*, 64 N.Y.2d 76, 473 N.E.2d 1181, 484 N.Y.S.2d 807 (1984). The facts there were strikingly similar to those in the case at hand. Mr. Friedsam was a Connecticut resident employed in New

York, and claimed alimony payments on his New York State income tax return in an amount proportionate to the relationship between his New York salary and his total income. Friedsam's deduction for alimony was disallowed by the New York tax authorities under then existing nonstatutory New York tax policies, and he sued to have that disallowance annulled and a judgment entered "holding that because a [New York] resident is allowed alimony paid as an adjustment against income while a nonresident is not, the disparity in treatment without a substantial reason is violative of the privileges and immunities clause . . . ." 98 A.D.2d at 27, 470 N.Y.S.2d at 849.

In the *Friedsam* case, The Appellate Division of the Supreme Court of the State of New York—Third Department (the "Appellate Division") held that New York's disallowance of a deduction for alimony to nonresidents such as Mr. Friedsam violated the Privileges and Immunities Clause, noting that under the challenged New York tax policy "it makes no difference where an alimony recipient lives, where the marriage and divorce took place, where the awarding divorce court was situated, or whether the recipient is taxed by New York. The only criterion is whether the payer [of alimony] is a resident or nonresident [of New York]. Without more, there results a constitutional violation which we may not condone." 98 A.D.2d at 29, 470 N.Y.S.2d at 850. On appeal, the New York Court of Appeals affirmed *Friedsam* on statutory grounds alone, holding that the disallowance of Mr. Friedsam's proportionate deduction of alimony violated the "policy of substantial equality" established by the tax statutes of New York then in effect. 64 N.Y.2d at 81-82, 473 N.E.2d at 1184, 484 N.Y.S.2d at 810. Subsequently, Section 631(b)(6) was enacted to revoke this "policy of substantial equality," which led to the proceedings which are the subject of this Petition for a Writ of Certiorari.

In the instant case, the Appellate Division followed its decision in *Friedsam* and unanimously held that Section

631(b)(6) is unconstitutional under the Privileges and Immunities Clause. *Lunding I*, 218 A.D.2d at 272, 639 N.Y.S.2d at 521, App. 15a. However, the New York Court of Appeals reversed and reinstated Section 631(b)(6), reasoning that this statute did not violate the Privileges and Immunities Clause, even though it imposed unequal taxation on nonresidents (which, indeed, evidently was its entire purpose and intended effect), for the purported reasons that "New York's treatment of alimony deductions is rationally related to its substantial policy of taxing only those gains realized and losses incurred by a nonresident in New York, while taxing residents on all income from whatever sources. Further, the challenged treatment is rationally related to its policy of limiting a nonresident's deductions to those attributable to income-producing activities in New York." 89 N.Y.2d at 291, App. 9a. For the reasons set forth below, this reasoning is specious; and there is no precedential support for using such factors to turn away a challenge to constitutionality of a statute based on the Privileges and Immunities Clause. Accordingly, Certiorari should be granted and Section 631(b)(6) declared unconstitutional.

REASONS FOR GRANTING THE PETITION

The Petition for a Writ of Certiorari in this case should be granted for two reasons set forth in Rule 10 of the Rules of the United States Supreme Court, *first*, because here the Court of Appeals of the State of New York, that State's court of last resort, "has decided an important federal question in a way that conflicts with the decision of another state court of last resort," (Sup. Ct. R. 10(b)) and, *second*, because it "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

A. There Is A Clear Conflict Between The Opinion Below And The Decisions Of Other State Courts Of Last Resort

Establishing the existence of grounds to invoke this reason to grant Certiorari are two decisions of courts of last resort of States other than New York, specifically, the State of Oregon and the State of South Carolina. In fact, in *Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988), the Supreme Court of Oregon has reached a judgment exactly contrary to the decision for which a Writ of Certiorari is sought here, based on indistinguishable facts. In *Wood*, the Oregon Supreme Court considered a challenge, under the Privileges and Immunities Clause, to an Oregon statute which denied a deduction for alimony to nonresidents while Oregon residents were allowed such a deduction. The plaintiff, Wood, practiced law in Oregon as a partner in a Portland, Oregon law firm, but resided in the State of Washington. The Court stated that "[t]he narrow question before this court is whether the distinction between the tax treatment of alimony payments of residents and nonresidents is an unconstitutional infringement on plaintiffs' rights under the federal Privileges and Immunities Clause." 305 Or. at 26, 749 P.2d at 1170. It squarely held that "[t]he alimony deduction is denied purely on the basis on nonresidence. As such, the taxing statutes eliminating the deduction are unconstitutional . . . ." 305 Or. at 33, 749 P.2d at 1174.

Unable to distinguish either the reasoning or the result in *Wood*, the New York Court of Appeals simply ignored it in its opinion below. The other case in which a state court of last resort reached a legal conclusion in clear conflict with that reached below is *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd by an equally divided court*, 471 U.S. 82 (1985). That case correctly is acknowledged in the opinion of the New York Court of Appeals below to support a proposition of law contrary to its reasoning and result. *See* 89 N.Y.2d at 283.

Spencer did not involve a specific discrimination against nonresidents in the deduction of alimony; rather, at issue there was the constitutionality of a South Carolina statute which (absent reciprocity) broadly prohibited a nonresident from allocating to South Carolina any portion of *any* of his or her nonbusiness deductions in computing his or her taxable income in South Carolina. The plaintiffs in *Spencer* lived in North Carolina, but Mr. Spencer was employed in South Carolina. The Supreme Court of South Carolina found that "[t]he discrimination against nonresident taxpayers in the case at bar clearly burdens their privilege of earning a living in the neighboring state of South Carolina" and held that "denying nonresidents nonbusiness deductions . . . allowed for South Carolina residents who work in the State violates the Privileges and Immunities Clause." 281 S.C. at 495-96, 316 S.E.2d at 388.

Wood and *Spencer* cannot be harmonized with the opinion below; in fact, they are directly contrary to it both in reasoning and in result. This presents a clear conflict among courts of last resort of three States on an important federal question, which should be addressed by a grant of a Writ of Certiorari to Petitioners here.

B. There Is A Clear Conflict Between The Opinion Below And The Relevant Decisions Of This Court

Quite apart from the obvious conflict with decisions of other State courts of last resort, the opinion of the New York Court of Appeals below clearly is in conflict with the relevant decisions of this Court on an important federal question. Discriminatory taxation of nonresidents has been held by this Court to be unconstitutional under the Privileges and Immunities Clause at least since 1870, when this Court decided *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870). There, this Court held that the Privileges and Immunities Clause, among other things, "plainly and unmistakably secures and protects the right of a citizen of one State . . . . to be exempt from

any higher taxes or excises than are imposed by the State upon its own citizens." 79 U.S. at 430. Amplifying upon these rights, this Court observed that "it should not be forgotten that the people of the several States live under one common Constitution, which was ordered to establish justice, and which, with the laws of Congress . . . is the supreme law of the land; and that the supreme law requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of other States." 79 U.S. at 431.

Ward, which struck down a discriminatory tax on nonresident merchants, was followed by *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60 (1920), which declared unconstitutional under the Privileges and Immunities Clause a New York statute which denied to nonresidents employed in New York personal exemptions from taxation which residents of New York enjoyed. In *Travis*, as here, the obvious discrimination in taxation against nonresidents was attempted to be justified by arguments that New York taxed the entire income of residents but exempted from taxation in New York many types of income of nonresidents; but this explicitly was held not to counterbalance the patent discrimination of denying nonresidents the exemptions from taxation which New York residents enjoyed. *Travis*, 252 U.S. at 81. This Court noted that proper analysis should focus on "the concrete, the particular incidence" of the discriminatory tax and stated that the discrimination in issue there was "not a case of occasional or accidental inequality due to circumstances personal to the taxpayer . . . ; but a general rule, operating to the disadvantage of all non-residents including those who are citizens of the neighboring States, and favoring all residents including those who are citizens of the taxing State" and thus unconstitutional. *Travis*, 252 U.S. at 80-81 (citation omitted). *Compare Shaffer v. Carter*, 252 U.S. 37 (1920) (dictum).

In more recent times, *Travis* was followed and cited with approval in *Austin v. New Hampshire*, 420 U.S. 656 (1975), a

case in which this Court declared unconstitutional under the Privileges and Immunities Clause a New Hampshire statute which had the discriminatory effect of taxing nonresidents working in that State, when New Hampshire residents were not similarly taxed. In *Austin*, this Court observed that in examining the validity of discriminatory taxation of nonresident individuals, its prior cases have reflected "an appropriately heightened concern for the integrity of the Privileges and Immunities Clause by erecting a standard of review *substantially more rigorous* than that applied to state tax distinctions among, say, forms of business organizations or different trades or professions," 420 U.S. at 663 (emphasis supplied), and have established "a *rule of substantial equality of treatment* for the citizens of the taxing State and nonresident taxpayers." *Id.* at 665 (emphasis supplied). *Cf. Williams v. Vermont*, 472 U.S. 14, 23 (1985) (holding under the Equal Protection Clause that "[a] State may not treat those within its borders unequally solely on the basis of their different residences . . . .")[2]

Turning from these generalities to the case at hand, *first*, there can be no question that Section 631(b)(6) was enacted for one reason and one reason only: Generate revenue at the expense of nonresident individuals by denying them any tax deduction for alimony payments, a deduction which is allowed without limit to New York residents. Obviously, this statute is a "general rule, operating to the disadvantage of all non-residents" who pay alimony. *Travis*, 252 U.S. at 81.

Once such discrimination is shown, under the established precedents of this Court the State which enacted the challenged statute must demonstrate a " 'substantial reason for the discrimination [against nonresidents] beyond the mere fact that they are citizens of other States.' " Such a reason would not exist "unless there is something to indicate that non-citizens constitute as particular source of the evil at which the [discriminatory] statute is aimed". Put differently, there must be a " 'reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them.' " *Hicklin v. Orbeck*, 427 U.S. 518, 525-26 (1978) (quoting *Toomer v. Witsell*, 334 U.S. 385, 396, 399 (1948)). Here, there is neither any evil, nor danger, nor legitimate reason whatsoever for the blatant discrimination practiced by this statute of the State of New York against nonresidents; rather this disadvantage is visited upon them for one reason and one reason only: They do not reside in New York.

[2] Recently, in *United Services Automobile Association v. Curiale*, 88 N.Y.2d 306, 313 n.5, 668 N.E.2d 384, 388 n.5, 645 N.Y.S.2d 413, 417 n.5 (1996), the New York Court of Appeals acknowledged these principles in holding unconstitutional a discriminatory New York statute which denied a tax credit to a foreign insurance company. However, it ignored these principles here, where the rights of nonresident individuals were in issue.

The federal question presented here is important for other reasons as well. *First*, focusing purely on deductibility of alimony, statistics show that in 1990, it is estimated that an adjustment for alimony paid was claimed on more than 650,000 federal income tax returns and that the aggregate amount so claimed exceeded $4.9 billion. Internal Revenue Service, Statistics of Income—1993, *Individual Income Tax Returns* (1996), at 6, Table A. *Second*, and more fundamentally, nonresident wage earners, unlike businesses, generally have no deductions related to their employment. Thus, if the decision of the New York Court of Appeals here is allowed to stand, States may take encouragement in denying to nonresident wage earners all deductions extended to resident taxpayers, resulting in a serious erosion of the principles of federalism and freedom of employment which the Privileges and Immunities Clause is intended to protect.

In short, whether the label given by the State of New York to the tax advantage denied to nonresidents is a personal exemption (as in *Travis*), a credit (as in *Curiale*) or a deduction (as here), the practical effect is to discriminate (by rais-

ing their taxes) against nonresidents who cannot vote in New York and therefore have no voice in the legislative processes of that State. This plainly is unconstitutional, and the Petition for Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: March 14, 1997

Respectfully submitted,

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APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

3 No. 260

In the Matter of Christopher H. Lunding et al.,

Respondents,

—v.—

Tax Appeals Tribunal of the State of New York,

Respondent,

Commissioner of Taxation and Finance
of the State of New York,

Appellant.

ANDREW D. BING, for appellant.

CHRISTOPHER H. LUNDING, *pro se*, for respondents.

OPINION

KAYE, CHIEF JUDGE:

In this combined action for a declaratory judgment and article 78 relief petitioners challenge the constitutionality of Tax Law § 631(b)(6), which disallows nonresidents a full deduction for alimony payments from their New York State income tax liability. The central question before us is whether Tax Law § 631(b)(6) violates the Privileges and Immunities

Clause of the United States Constitution. We conclude the statute is constitutional.

Petitioners Christopher H. Lunding and his wife Barbara J. Lunding are Connecticut residents. In 1990, Mr. Lunding, a partner in a New York City law firm, derived substantial income from the practice of law in this State. On their joint New York nonresident tax return filed for the year 1990, they reported a Federal adjusted gross income of $788,210, which included an adjustment of $108,000 for the full amount of alimony that Mr. Lunding had paid that year to his former spouse, also a Connecticut resident. On their return petitioners adjusted their New York State gross income by 48.0868% of the alimony payments—equaling $51,934—which represented the percentage of Mr. Lunding's 1990 claimed New York business income.

Relying on Tax Law § 631(b)(6) the Audit Division of the Department of Taxation and Finance denied the alimony deduction and recalculated petitioners' New York tax liability, concluding that they owed an additional $3,724. A Notice of Deficiency in that amount followed.

Petitioners then filed an administrative petition with the Division of Tax Appeals challenging the Notice of Deficiency on the ground that Tax Law § 631(b)(6) was unconstitutional. Specifically, petitioners claimed that the tax which was the subject of the Notice of Deficiency cannot be collected because the statute and the Department's actions discriminate illegally against nonresidents in violation of the Privileges and Immunities, Equal Protection and Commerce Clauses of the United States Constitution.

The Administrative Law Judge sustained the disallowance, holding that the Tax Appeals Tribunal lacked authority to declare the statute unconstitutional. In their exception petitioners conceded that the Tribunal's jurisdiction did not encompass their constitutional challenge but asserted that principles of collateral estoppel and *stare decisis* applied, relying on the Third Department's ruling in *Matter of Friedsam v State Tax Commn* (98 AD2d 26, *affd* 64 NY2d 76). The Tribunal affirmed the decision of the ALJ, agreeing that *Friedsam* was not dispositive.

Thereafter, petitioners commenced an article 78 proceeding. The Appellate Division converted the constitutional challenge into a declaratory judgment action and retained as an article 78 proceeding the remaining portion seeking annulment of the Tribunal's decision. While recognizing both that this Court had affirmed *Friedsam* solely on statutory grounds and that the statutory provisions in the two cases are different, the Appellate Division declared the statute violative of the Privileges and Immunities Clause. Respondent Commissioner appealed as of right (CPLR 5601[b][1]). We now reverse.

Statutory Scheme

Tax Law § 631(b)(6), enacted as part of the Tax Reform and Reduction Act of 1987 (L 1987, ch 28) (TRARA), specifies that

> "the deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources."

New York source income of a nonresident is defined under Tax Law § 631(a) as:

> "the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources, including:
>
> "(1) his distributive share of partnership income, gain, loss and deduction * * *
>
> "(2) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to * * *
>
> > "(B) a business, trade, profession or occupation carried on in this state * * *."

Beginning with the 1988 taxable year nonresidents' income from all sources is used in calculating their rate of New York tax. As we explained in *Brady v State of New York* (80 NY2d 596, 600, *cert denied* 509 US 905), under Tax Law § 601(e)(1) the tax of a nonresident is first calculated "as if [the taxpayer] were a resident," and the sum is then reduced by the percentage of income earned in New York compared to total income. While residents and nonresidents with the same total income are taxed at the same rate, the nonresident thus is taxed only on the percentage of income attributable to New York.

Consequently, Tax Law § 601(e)(1) provides:

> "(1) There is hereby imposed for each taxable year on the taxable income which is derived from sources in this state of every nonresident * * * a tax which shall be equal to the tax computed under subsections (a) through (d) of this section * * * as if such nonresident * * * were a resident, multiplied by a fraction, the numerator of which is such individual's * * * New York source income determined in accordance with Part III of this article [§ 631] and the denominator of which is such individual's * * * federal adjusted gross income for the taxable year."

The hypothetical "as if a resident" tax liability includes all deductions available to a resident, including a deduction for alimony payments. However, the numerator of the fraction (referred to as the "apportionment percentage")—the nonresident's New York source income—is not reduced by any nonbusiness deductions (including alimony payments). The denominator—the nonresident's Federal adjusted gross income—has under the Internal Revenue Code been reduced by any alimony payments (26 USC § 215).

Petitioners urge that Tax Law § 631(b)(6) is discriminatory because, without justification, it denies nonresidents the benefit of an alimony deduction from New York State tax liability. The Appellate Division agreed that the Privileges and

Immunities Clause was violated. We answer the question differently.

Analysis

We begin with the familiar proposition that statutes—the enactments of a co-equal branch of government—enjoy a presumption of constitutionality. Moreover, "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." (*Austin v New Hampshire*, 420 US 656, 661-662 [citing *Madden v Kentucky*, 309 US 83, 88; *Lehnhausen v Lake Shore Auto Parts Co.*, 410 US 356].)

The Privileges and Immunities Clause, entitling the "Citizens of each State * * * to all Privileges and Immunities of Citizens in the several States," was intended to create a national economic union and establish a norm of comity between the States. The Clause in essence ensures that citizens of State A may do business in State B on terms of substantial equality with the citizens of that State. (*See, Supreme Court of New Hampshire v Piper*, 470 US 274, 279-280; *Toomer v Witsell*, 334 US 385, 396.)

In two seminal decisions on State income taxation of nonresidents under the Privileges and Immunities Clause—*Shaffer v Carter* (252 US 37) and *Travis v Yale and Towne Mfg Co* (252 US 60)—the Supreme Court established that limiting taxation of nonresidents to their in-State income was a sufficient justification for similarly limiting their deductions to expenses derived from sources producing that in-State income. Further, the Court made clear that in testing the constitutionality of a tax law, a court should put aside "theoretical distinctions" and look to "the practical effect and operation" of the scheme (*Shaffer v Carter*, 252 US at 56).

Thus, in *Shaffer* the Court upheld a provision of the Oklahoma income tax law that taxed nonresidents' income derived from local property and business and limited their deductions to losses related to these in-State activities, where Oklahoma also taxed all income of its own citizens. Similarly in *Travis*, the Court considered a New York statutory provision limiting

a nonresident's income tax deductions to such as "are connected with income arising from sources within the state" (*Travis*, 252 US at 73). In upholding the provision the Court noted that

> "there is no unconstitutional discrimination against citizens of other States in confining the deduction of expenses, losses, etc., in the case of non-resident taxpayers, to such as are connected with income arising from sources within the taxing State, likewise is settled by [*Shaffer*]."

(*Id.* at 75-76.) The *Travis* Court, however, considered an additional provision of the Tax Law that disallowed nonresidents any personal exemptions and found this an unreasonable discrimination because New York's proffered hope of reciprocity did not justify the statute's discriminatory effect (*id.* at 81-82).

More recently, the Supreme Court in *Austin v New Hampshire* (420 US 656) invalidated New Hampshire's commuters' income tax where it determined that "the tax falls exclusively on the income of nonresidents; and it is not offset even approximately by other taxes imposed upon residents alone" (*id.* at 665). Indeed, the practical effect of the tax scheme in *Austin* was that New Hampshire taxed only the income of nonresidents working in the State, whereas its own residents paid no income tax whatever (*but see*, *Spencer v South Carolina Tax Commission*, 281 SC 492, 316 SE2d 386, *affd by an equally divided court*, 471 US 82 [reciprocity between States insufficient justification for disallowance of alimony deduction]).

As these cases illustrate, the Privileges and Immunities Clause does not mandate absolute equality in tax treatment. Rather, disparity in tax treatment between residents and nonresidents is permissible "in the many situations where there are perfectly valid independent reasons for it" (*Toomer v Witsell*, 334 US at 396). Therefore, the Clause is not violated where "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." (*Supreme Court of New Hampshire v Piper*, 470 US at 284.)

In this State, the propriety of disallowing deductions to nonresidents for personal expenses unrelated to New York income-producing sources was definitively addressed in *Matter of Goodwin v State Tax Comm* (286 App Div 694, *affd* 1 NY2d 680, *appeal dsmsd* 352 US 805). There, the petitioner, a lawyer residing in New Jersey and practicing in New York City, challenged New York's disallowance of deductions he claimed for his New Jersey real estate taxes, interest payments, medical expenses and life insurance premiums. In upholding the challenged disallowance, the Appellate Division gave three independently sufficient reasons to support the statute, two of which are particularly instructive here.

First, New York residents—unlike nonresidents—were subject to the burden of taxation on their worldwide income regardless of source and therefore were entitled to the offsetting benefit of full deductions (286 App Div at 696-698). Second, the court found it reasonable to disallow the deductions because they were personal expenses of the taxpayer and therefore "clearly a part of the petitioner's personal activities in his home State * * * If these expenditures are to be allowed as deductions at all, they should be allowed by the State of the taxpayer's residence" (*id.* at 701). Lastly, *Goodwin* justified the disparity on the basis that deductions for certain personal expenses reflected acceptable State policy "to give aid or encouragement of the character embodied in the tax deductions to its own residents" where the policies were linked to residence, and in such instances the State was not "constitutionally required to extend similar aid or encouragement to the residents of other States." (*Id.* at 702.)

After *Goodwin*, the Appellate Division in *Matter of Golden* (88 AD2d 1058) considered a Privileges and Immunities challenge to New York's policy of granting a moving expenses deduction to residents while denying it to nonresidents. Finding no justification for the disparate treatment the court, over the dissent of then-Justice Levine, struck down the statute. This Court affirmed the Appellate Division order but solely on the narrow ground that the Tax Commission in its answer

and bill of particulars had offered only nonresidence as the explanation for the disallowance (58 NY2d 1047, 1049). Manifestly, *Golden*'s limited holding does not control the present case.

Nor does our affirmance in *Friedsam* undercut *Goodwin*'s applicability here. In *Friedsam*, under facts similar to the present case, a Connecticut resident challenged New York's policy of disallowing alimony deductions from a nonresident's New York adjusted gross income. The Appellate Division, again over the dissent of then-Justice Levine, upheld the challenge concluding that there was no social policy justification for the disparate treatment. We affirmed, but only on statutory grounds. Pointing to former Tax Law § 635(c)(1)—which provided that "[t]he New York itemized deduction of a nonresident individual shall * * * be the same as for a resident individual"—we concluded the alimony disallowance was "contrary to statute and tax policy of this State." (*Friedsam*, 64 NY2d at 81-82). As petitioner concedes, Tax Law § 631(b)(6), enacted some three years after *Friedsam*, had the effect of removing this impairment.

Now applying well-established principles to the facts before us, we conclude there is no violation of the Privileges and Immunities Clause. The disparate tax treatment of alimony paid by a nonresident is fully justified in light of the disparate treatment of income: nonresidents are taxed only on income earned in New York, while residents are taxed on all income earned from whatever sources. Focusing on the practical effect and operation of the challenged tax it is clear that the advantage granted residents is offset by the additional burden of being taxed on all sources of income. Indeed, unlike *Travis* and *Shaffer*, nonresidents are not denied all benefit of the alimony deduction since they can claim the full amount of such payments in computing the hypothetical tax liability "as if a resident" under Tax Law § 601(e).

Furthermore, the disallowance is substantially justified by the fact that petitioner's alimony payments are—not unlike the expenditures for life insurance, out-of-State property taxes and medical treatment at issue in *Goodwin*—wholly linked to personal activities outside the State. There is nothing to "warrant the petitioner's shifting the allowance for these expenditures, which are intimately connected with the State of his residence, to New York State." (*Goodwin*, 286 App Div at 701.) Indeed, there can be no serious argument that petitioners' alimony deductions are legitimate business expenses. Thus, the approximate equality of tax treatment required by the Constitution is satisfied, and greater fine-tuning in this tax scheme is not constitutionally mandated.

Moreover, petitioners' argument that the silence of TRARA's legislative history as to the substantial reasons behind the treatment of nonresidents' alimony deductions somehow preordains its unconstitutionality is without merit. Where, as here, substanial reasons for the disparity in tax treatment are apparent on the face of the statutory scheme, absence of a statement at the time of enactment will not invalidate the statute.

Petitioners fare no better under the Equal Protection and Commerce Clauses. Nothing in the Fourteenth Amendment prevents the States from imposing unequal taxation on nonresidents, so long as the inequality is rationally related to the furtherance of a legitimate State interest (*see*, *Shaffer*, 252 US at 227-28; *Western & Southern Life Ins Co v State Board of Equalization*, 451 US 648, 667-68). Here, New York's treatment of alimony deductions is rationally related to its substantial policy of taxing only those gains realized and losses incurred by a nonresident in New York, while taxing residents on all income from whatever sources. Further, the challenged treatment is rationally related to its policy of limiting a nonresident's deductions to those attributable to income-producing activities in New York. Even if this matter concerning alimony payments were deemed to involve interstate commerce, petitioners' Commerce Clause claim would ultimately fail for the same reason.

Accordingly, the judgment of the Appellate Division should be reversed, with costs, the petition dismissed and judgment granted declaring Tax Law § 631(b)(6) constitutional.

* * *

Judgment reversed, with costs, petition dismissed and judgment granted declaring Tax Law § 631(b)(6) constitutional. Opinion by Chief Judge Kaye. Judges Simons, Titone, Bellacosa, Smith, Levine and Ciparick concur.

Decided December 18, 1996

APPENDIX B

SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

No. 74021
Decided and Entered: March 14, 1996

In the Matter of CHRISTOPHER H. LUNDING et al.,

Petitioners,

—v—

TAX APPEALS TRIBUNAL OF
THE STATE OF NEW YORK, et al.,

Respondents.

Calendar Date: January 17, 1996

Before:

MIKOLL, J.P., MERCURE, YESAWICH JR.,
PETERS and SPAIN, JJ.

Cleary, Gottlieb, Steen & Hamilton (Christopher H. Lunding of counsel), New York City, petitioners in person.

Dennis C. Vacco, Attorney-General (Andrew Bing of counsel), Albany, for Commissioner of Taxation & Finance, respondent.

OPINION AND JUDGMENT

PETERS, J.

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to Tax Law § 2016) to review a determination of respondent Tax Appeals Tribunal which sustained a personal income tax assessment imposed under Tax Law article 22.

Petitioner Christopher H. Lunding (hereinafter Lunding), a partner in a New York City law firm, derived substantial income in this State during 1990 from his practice of the legal profession. As Connecticut residents, petitioners timely filed a joint nonresident New York State personal income tax return.

Thereon, petitioners included $108,000 of alimony reported to have been paid during the relevant time by Lunding to his former spouse, also a Connecticut resident. Concluding that 48.0868% of such alimony, equaling $51,934, represented the amount of business income derived from or connected with this State, petitioners sought a deduction on their tax return for that portion of alimony. In March 1992, the Audit Division of the Department of Taxation and Finance (hereinafter the Division) disallowed the $51,934 deduction and issued a notice of deficiency to petitioners on the basis of Tax Law § 631 (b) (6), which provides that nonresidents may not take the alimony deduction authorized by the Internal Revenue Code (*see*, 26 USC § 215). Hence, petitioners' tax liability was increased by $3,724, plus interest.

Petitioners administratively appealed the determination, alleging that Tax Law § 631 (b) (6) violates the Privileges and Immunities Clause (US Const, art IV, § 2), the Equal Protection Clause (US Const 14th Amend) and the Commerce Clause (US Const, art I, § 8).[1] Thereafter, the Administrative Law Judge recognized that neither the Division nor the Tax

[1] Petitioners acknowledge that for the purpose of appeal, should Tax Law § 631 (b) (6) be found constitutional, they owe the disputed amount.

Appeals Tribunal has jurisdiction to determine whether a statute is unconstitutional on its face. Accordingly, it upheld the disallowance, as did the Tribunal. Petitioners then commenced this CPLR article 78 proceeding.

As a proceeding commenced pursuant to CPLR article 78 is not the proper vehicle to challenge the constitutionality of a statute (*see*, *Press v County of Monroe*, 50 NY2d 695, 702; *Matter of Ames Volkswagen v State Tax Commn.*, 47 NY2d 345, 348), we will convert that portion of the instant proceeding seeking such relief into a declaratory judgment action (*see*, CPLR 103[c]) and retain the remaining portion thereof as a proceeding commenced pursuant to CPLR article 78 since petitioners also seek annulment of the Commissioner's determination upholding the tax assessment (*compare*, *Matter of Ames Volkswagen v State Tax Commn.*, *supra*).

Addressing the challenge to Tax Law § 631 (b) (6) as being violative of the Privileges and Immunities Clause because only nonresident taxpayers are denied the alimony deduction (*see*, Tax Law § 631 [b] [6]), we follow our decision in *Matter of Friedsam v State Tax Commn.* (98 AD2d 26, *affd* 64 NY2d 76). Therein, we addressed whether Tax Law former § 632 violated the same constitutional provision by denying the nonresident petitioner, employed in New York and living in Connecticut, the income tax adjustment for alimony paid to his nonresident ex-spouse (*see*, *id.*). We recognized therein that although a disparity in treatment is permitted if valid reasons exist, the Privileges and Immunities Clause proscribes such conduct as discriminatory against nonresidents "where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States" (*Matter of Golden v Tully*, 88 AD2d 1058, 1058, *affd* 58 NY2d 1047; *see*, *Matter of Friedsam v State Tax Commn.*, 98 AD2d 26, 28, *supra*). Rejecting the proffered reason that "alimony payments are purely personal in nature and not related to income producing activities in New York" (*Matter of Friedsam v State Tax Commn.*, *supra*, at 28) to justify the disparate treat-

ment, we found that the petitioner had been unconstitutionally denied the alimony deduction.[2]

The Court of Appeals affirmed our decision on statutory, not constitutional, grounds (*see, Matter of Friedsam v State Tax Commn.*, 64 NY2d 76, 79). Thereafter, the Legislature enacted the Tax Reform and Reduction Act of 1987 which, *inter alia*, added Tax Law § 631 (b) (6) (L 1987, ch 28, § 78) to address the Court of Appeals' concerns in *Matter of Friedsam v State Tax Commn.* (64 NY2d 76, *supra*) and provide express statutory authority to deny alimony deduction to nonresidents.

We find that the addition of Tax Law § 631 (b) (6) to expressly authorize the denial of the alimony deduction to nonresidents does not alter or undermine our previous findings concerning the constitutionality of such practice (*see, Matter of Friedsam v State Tax Commn.*, 98 AD2d 26, 26-29, *supra*) or present a "compelling reason" to reach a different result on the identical legal issue (*see, Dufel v Green*, 198 AD2d 640, 640, *affd* 84 NY2d 795). Hence, mindful that "[o]nce this Court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision under the doctrine of stare decisis, which recognizes that legal questions, once resolved, should not be reexamined every time they are presented" (*id.* at 640), we find our constitutional analysis in *Matter of Friedsam v State Tax Commn.* (98 AD2d 26, *supra*) determinative of the issue now before us.

Our examination of the legislative history behind Tax Law § 631 (b) (6) reveals no stated reason or discussion addressing the rationale underlying a denial to only nonresidents of the alimony deduction authorized by the Internal Revenue Code (*see*, 26 USC § 215) in proportion with their New York income (*see*, L 1987, ch 28; Governor's Annual Message, 1987 NY Legis Ann, at 2-3; Governor's Mem 1987 NY Legis Ann, at 59; Mem of Senate Sponsor, 1987 NY Legis Ann, at

[2] The determination of the former State Tax Commission was therefore annulled (*Matter of Friedsam v State Tax Commn., supra*, at 29).

58-59; *accord, Matter of Friedsam v State Tax Commn.*, 98 AD2d 26, 28, *supra*). Each of the reasons proffered by respondents were expressly addressed and rejected by us in *Matter of Friedsam v State Tax Commn.* (98 AD2d 26, 28-32, *supra*). Since Federal policy regarding the alimony deduction recognizes that tax consequences should rightly fall upon the recipients of the alimony, not the payors (*see*, 26 USC §§ 71, 215), and that pursuant to the statute before us the denial of the deduction to a nonresident taxpayer ignores, *inter alia*, where the recipient resides or whether the recipient is taxed by this State (*see, Matter of Friedsam v State Tax Commn.*, 98 AD2d 26, 29, *supra*), it becomes clear that there exists no substantial reason for the disparate treatment; leaving as "[t]he only criterion * * * whether the payor is a resident or nonresident. Without more, there results a constitutional violation * * *" (*Matter of Friedsam v State Tax Commn.*, 98 AD2d 26, 29, *supra*; *see, Toomer v Witsell*, 334 US 385; *Matter of Golden v Tully*, 88 AD2d 1058, *supra*).

Mikoll, J.P., Mercure, Yesawich Jr. and Spain, JJ., concur.

ADJUDGED that the proceeding is partially converted to an action for declaratory judgment, it is declared that Tax Law § 631 (b) (6) is unconstitutional, remainder of petition is granted, with costs, and determination of respondent Tax Appeals Tribunal is annulled.

ENTER:

Michael J. Novack
Clerk of the Court

APPENDIX C

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

DTA No. 810921

In the Matter of the Petition

of

CHRISTOPHER H. AND BARBARA J. LUNDING for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1990.

DECISION

Petitioners Christopher H. and Barbara J. Lunding, 276 Otter Rock Drive, Greenwich, Connecticut 06830, filed an exception to the determination of the Administrative Law Judge issued on April 28, 1994. Petitioners appeared *pro se*. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a brief referring the Tax Appeals Tribunal to its brief filed before the Administrative Law Judge. This letter was received on August 26, 1994 and began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

Issues

I. Whether Tax Law § 631(b)(6) is unconstitutional under the Privileges and Immunities Clause, the Commerce Clause

and/or the Equal Protection Clause of the United States Constitution.

II. Whether the principles of stare decisis and collateral estoppel are properly applicable in this matter as to *Matter of Friedsam v. State Tax Commn.* (98 AD2d 26, 470 NYS2d 848, *affd* 64 NY2d 76, 484 NYS2d 807).

Findings of Fact

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Stipulated Facts

Pursuant to 20 NYCRR 3000.7, the parties stipulated and agreed that the following facts shall be taken as true for all purposes of this proceeding.

In 1990, petitioner Christopher H. Lunding derived substantial income in New York State from his practice of the legal profession in New York State as a partner in the law firm of Cleary, Gottlieb, Steen & Hamilton and worked at the office of that law firm located in the City and State of New York. New York was the principal source of earned income of petitioner Christopher H. Lunding in 1990.

Petitioners timely filed a joint Nonresident New York State Personal Income Tax Return on Form IT-203 for the year 1990 (the "1990 New York return").

Petitioners included $108,000.00 of alimony reported to have been paid in 1990 by petitioner Christopher H. Lunding (the "alimony") on line 18 of the 1990 New York return as part of their total Federal adjustments to income and included 48.0868% of that alimony ($51,934.00) in the "New York State Amount" on that line. Said 48.0868% was the percentage of the 1990 business income of petitioner Christopher H. Lunding reported in Form IT-203-A included in the 1990 New York return as having been derived from or connected with New York State sources.

The Division of Taxation ("Division") of the Department of Taxation and Finance denied this $51,934.00 New York deduction and issued a Notice of Deficiency against petitioners on March 16, 1992, for the stated reason that Tax Law § 631(b)(6) provides that the deduction for alimony allowed by section 215 of the Internal Revenue Code of 1986 shall not constitute a deduction derived from New York sources for nonresident individuals.

The effect of this denial was to increase petitioners' alleged New York State personal income tax liability for 1990 (excluding interest) by $3,724.00 (the "disputed amount") from the total New York State personal income tax liability shown by petitioners on the 1990 New York return as originally filed.

In the event that Tax Law § 631(b)(6) is a valid, constitutional statute (as the Division contends), petitioners owe the disputed amount. In the event that Tax Law § 631(b)(6) is unconstitutional (as petitioners contend), petitioners do not owe the disputed amount.

On June 10, 1992, petitioners duly filed a petition in the Division of Tax Appeals seeking a redetermination/revision of the above-referenced Notice of Deficiency. On August 28, 1992, the Division duly filed its answer to this petition.

Additional Facts

At all times since 1980, petitioner Christopher H. Lunding has been a resident of the State of Connecticut and has resided continuously At 276 Otter Rock Drive, Greenwich, Connecticut, approximately two miles from the New York State border.

On July 7, 1989, a judgment was entered in the Superior Court of the State of Connecticut, at Bridgeport, Connecticut, adjudging and declaring the marriage of petitioner Christopher H. Lunding to his then spouse to be dissolved, and ordering the parties to that action to comply with the Separation Agreement between them, dated May 31, 1989 (the "Separation Agreement"), which was incorporated by reference into that judgment.

The Separation Agreement requires petitioner Christopher H. Lunding to pay alimony to his former spouse in the annual amount of $108,000.00, which alimony was in fact paid by Mr. Lunding in 1990. Mr. Lunding's former spouse was a resident of the State of Connecticut at all times in 1990.

On August 19, 1989, petitioner Christopher H. Lunding married petitioner Barbara J. Lunding at Greenwich, Connecticut. Since that date, petitioners have resided continuously at 276 Otter Rock Drive, Greenwich, Connecticut.

Prior to the issuance of the Notice of Deficiency, the Division issued to petitioners a Statement of Proposed Audit Changes. The statement indicated that:

> "A nonresident is not allowed the Federal deduction for alimony paid because it is not considered a deduction from income derived from New York sources. (Section 631[b][6] of the New York State Tax Law)."

The statement also provided a computation of tax due for the year 1990 based upon the disallowance of the deduction for alimony paid as follows:

"TAX PERIOD ENDED DATE: 12/31/90
TAX YEAR: 1990 FILE DUE DATE: 08/15/91
DATE RECEIVED: 07/30/91

FILING STATUS: 02

CORRECTED NEW YORK LINE 18:	$17,741.00
CORRECTED NEW YORK LINE 19:	$402,422.00
New York State Tax:	$56,487.00
Income Percentage: .5106	
Allocated New York State Tax:	$28,842.00
Tax Previously Stated/Adjusted:	$25,118.00
Additional Tax Due:	$3,724.00

Tax Per Taxpayer:	25,119.00
Tax Per Dept of Tax & Finance:	28,842.00
Timely Payments/Credits:	45,251.00
Late Payments:	0.00

Amount Previously Assessed/ Refunded:	20,133.00–
BALANCE:	3,724.00
Tax Amount Assessed:	3,724.00"

Opinion

Tax Law § 631(a) provides that:

> "[t]he New York source income of a nonresident individual shall be the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income . . . derived from or connected with New York sources . . . ."

Pursuant to section 215 of the Internal Revenue Code, alimony paid is a deductible expenditure when arriving at adjusted gross income (Internal Revenue Code § 215). However, for New York State income tax purposes, a nonresident is not allowed a deduction for alimony paid on his or her New York return pursuant to Tax Law § 631(b)(6). This provision was added by chapter 28 of the Laws of 1987.

Prior to the enactment of section 631(b)(6), in *Matter of Friedsam v. State Tax Commn.* (98 AD2d 26, 470 NYS2d 848, *affd* 64 NY2d 76, 484 NYS2d 807), the former State Tax Commission disallowed a deduction for alimony paid by a nonresident taxpayer on his New York nonresident return holding that alimony is not a deduction associated with the production of New York source income pursuant to Tax Law former § 632(b)(1)(B). Tax Law former § 632 provided as follows:

> "(a) General. The New York adjusted gross income of a nonresident individual shall be the sum of the following:
>
> "(1) the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources . . . .
>
> * * *
>
> "(b) Income and deductions from New York sources.
>
> "(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:
>
> * * *
>
> "(B) a business, trade, profession or occupation carried on in this state."

Special Term, Albany County annulled the determination of the State Tax Commission holding that the disparate treatment accorded nonresidents seeking an alimony deduction as compared to residents was violative of the Privileges and Immunities Clause of the United States Constitution. The Appellate Division, Third Department affirmed Special Term holding that it was unconstitutional to deny the deduction based solely on the taxpayer's status as a nonresident (*Matter of Friedsam v. State Tax Commn.*, *supra*, 470 NYS2d 848, 850). The Appellate Division framed the issue as whether the application of section 632 by the State Tax Commission violated the constitution.

The Court of Appeals affirmed the Appellate Division on statutory grounds, not constitutional grounds. The Court of Appeals held that in disallowing the nonresident taxpayer's alimony deduction, the State Tax Commission "improperly applied [former] section 632 (subd. [a], par. [1]) of the Tax Law and failed to apply section 635 (subd. [c], par. [1]) of the Tax Law" (*Matter of Friedsam v. State Tax Commn.*, *supra*, 484 NYS2d 807, 810). The Court stated that

> "[t]he passage of section 635 (subd. [c], par. [1]) reflected a policy decision 'that nonresidents be allowed the same non-business deductions as residents, but that

such deductions be allowed to nonresidents in the proportion of their New York income to income from all sources' " (*Matter of Friedsam v. State Tax Commn.*, *supra*, 484 NYS2d 807, 810 *quoting* Murphy and Petite, Taxation of Nonresidents by New York State, 12 Syracuse L. Rev. 147, 161-162).

The Administrative Law Judge held that at the administrative level statutes are presumed constitutional, so petitioners' assertion that Tax Law § 631(b)(6) is unconstitutional was not within the jurisdiction of the Division of Tax Appeals or the Tax Appeals Tribunal.

Next, the Administrative Law Judge held that the doctrines of collateral estoppel and stare decisis[1] were not applicable in this matter because the Division's disallowance of petitioners' alimony deduction on their nonresident return is premised on different authority than the former State Tax Commission's denial in *Matter of Friedsam v. State Tax Commn.* (*supra*). The Administrative Law Judge stated:

"requirements for application of the doctrine [of collateral estoppel] are: (1) that the issue as to which preclusion is sought be identical with that in the prior proceeding; (2) that the issue was necessarily decided in the prior proceeding; and (3) that the litigant who will be held precluded in the present matter had a full and fair opportunity to litigate the issue in the prior proceeding [citation omitted]" (Determination, conclusion of law "F").

The Administrative Law Judge held that there was no identity of issues since the disallowance of the alimony deduction in *Matter of Friedsam v. State Tax Commn.* (*supra*) was not premised on Tax Law § 631(b)(6) as it was not enacted until 1987. Thus, the doctrine of collateral estoppel was not applicable.

---

[1] The Administritive Law Judge stated that it was unnecessary to separately address petitioners' stare decisis argument because he deemed the two arguments interrelated.

On exception, petitioners concede that the Tax Appeals Tribunal's jurisdiction does not encompass challenges to the constitutionality of a statute on its face, but assert that as a matter of law the Appellate Division, Third Department has already ruled that it is unconstitutional to disallow an alimony deduction to a nonresident taxpayer. Petitioners contend that although the Court of Appeals decided *Matter of Friedsam v. State Tax Commn.* (*supra*) upon statutory grounds, the Third Department's decision in *Friedsam* was neither modified nor vacated by the Court of Appeals, so it is still binding precedent. Thus, petitioners assert that under principles of stare decisis and collateral estoppel, the Tax Appeals Tribunal is compelled to follow the Third Department's decision in *Matter of Friedsam v. State Tax Commn.* (*supra*).

We affirm the determination of the Administrative Law Judge.

The assertions made by petitioners concerning the applicability of the doctrine of collateral estoppel in this matter are the same as those made at hearing. The determination of the Administrative Law Judge dealt fully and correctly with this issue and we affirm for the reasons stated therein.

Next, because stare decisis is a much broader concept than collateral estoppel, we feel it is necessary to separately address whether *Matter of Friedsam v. State Tax Commn.* (*supra*) should be followed in the instant matter.

We find petitioners' reliance on *Matter of Friedsam v. State Tax Commn.* (*supra*), misplaced. The former State Tax Commission's denial of the nonresident taxpayer's alimony deduction in *Friedsam* was an application of the general definition of adjusted gross income of a nonresident individual contained in Tax Law former § 632. The Appellate Division found this application by the State Tax Commission to be unconstitutional. In petitioners' case, the denial was predicated on Tax Law § 631(b)(6) which, on its face, explicitly denies a nonresident an alimony deduction on his or her New York return. Although petitioners carefully craft their arguments in terms of a general issue, i.e., whether the disparate treatment accorded nonresident taxpayers as compared to resident taxpayers concerning the deductibility of alimony

payments on their New York returns is constitutional, *Friedman* established a principal of law that is not dispositive of the issue before us. Therefore, the doctrine of stare decisis does not require us to do indirectly that which cannot be done directly—declare Tax Law § 631(b)(6) unconstitutional on its face.

Accordingly, it is ORDERED, ADJUGED and DECREED that:

1. The exception of Christopher H. and Barbara J. Lunding is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Christopher H. and Barbara J. Lunding is denied.

DATED: Troy, New York
Feb 23 1995

/s/ JOHN P. DUGAN
John P. Dugan
President

/s/ FRANCIS R. KOENIG
Francis R. Koenig
Commissioner

APPENDIX D

STATE OF NEW YORK
DIVISION OF TAX APPEALS

DTA NO. 810921

In the Matter of the Petition

of

CHRISTOPHER H. AND BARBARA J. LUNDING

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1990.

DETERMINATION

Petitioners, Christopher H. and Barbara J. Lunding, 276 Otter Rock Drive, Greenwich, Connecticut 06830, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1990.

On July 5, 1993 and July 19, 1993, respectively, petitioners, appearing *pro se*, and the Division of Taxation by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel) consented to have the instant controversy determined on submission without hearing. Documentary evidence was submitted by the Division of Taxation on June 15, 1992. Petitioners submitted documentary evidence and a brief on September 17, 1993. The Division of Taxation submitted a letter in lieu of a brief on October 12, 1993 and petitioners submitted a reply brief on November 5, 1993. After review of the entire record, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether Tax Law § 631(b)(6) is unconstitutional under the Privileges and Immunities Clause, the Commerce Clause and/or the Equal Protection Clause of the United States Constitution.

II. Whether the principles of stare decisis and collateral estoppel as to the opinion of the Appellate Division, Third Department in the *Friedsam* case are properly applicable in this matter.

FINDINGS OF FACT
Stipulated Facts

Pursuant to 20 NYCRR 3000.7, the parties stipulated and agreed that the following facts shall be taken as true for all purposes of this proceeding.

1. In 1990, petitioner Christopher H. Lunding derived substantial income in New York State from his practice of the legal profession in New York State as a partner in the law firm of Cleary, Gottlieb, Steen & Hamilton and worked at the office of that law firm located in the City and State of New York. New York was the principal source of earned income of petitioner Christopher H. Lunding in 1990.

2. Petitioners timely filed a joint Nonresident New York State Personal Income Tax Return on Form IT-203 for the year 1990 (the "1990 New York return").

3. Petitioners included $108,000.00 of alimony reported to have been paid in 1990 by petitioner Christopher H. Lunding (the "alimony") on line 18 of the 1990 New York return as part of their total Federal adjustments to income and included 48.0868% of that alimony ($51,934.00) in the "New York State Amount" on that line. Said 48.0868% was the percentage of the 1990 business income of petitioner Christopher H. Lunding reported in Form IT-203-A included in the 1990 New

York return as having been derived from or connected with New York State sources.

4. The Division of Taxation ("Division") of the Department of Taxation and Finance denied this $51,934.00 New York deduction and issued a Notice of Deficiency against petitioners on March 16, 1992, for the stated reason that Tax Law § 631(b)(6) provides that the deduction for alimony allowed by section 215 of the Internal Revenue Code of 1986 shall not constitute a deduction derived from New York sources for nonresident individuals.

5. The effect of this denial was to increase petitioners' alleged New York State personal income tax liability for 1990 (excluding interest) by $3,724.00 (the "disputed amount") from the total New York State personal income tax liability shown by petitioners on the 1990 New York return as originally filed.

6. In the event that Tax Law § 631(b)(6) is a valid, constitutional statute (as the Division contends), petitioners owe the disputed amount. In the event that Tax Law § 631(b)(6) is unconstitutional (as petitioners contend), petitioners do not owe the disputed amount.

7. On June 10, 1992, petitioners duly filed a petition in the Division of Tax Appeals seeking a redetermination/revision of the above-referenced Notice of Deficiency. On August 28, 1992, the Division duly filed its answer to this petition.

Additional Facts

8. At all times since 1980, petitioner Christopher H. Lunding has been a resident of the State of Connecticut and has resided continuously at 276 Otter Rock Drive, Greenwich, Connecticut, approximately two miles from the New York State border.

9. On July 7, 1989, a judgment was entered in the Superior Court of the State of Connecticut, at Bridgeport, Connecticut,

adjudging and declaring the marriage of petitioner Christopher H. Lunding to his then spouse to be dissolved, and ordering the parties to that action to comply with the Separation Agreement between them, dated May 31, 1989 (the "Separation Agreement"), which was incorporated by reference into that judgment.

10. The Separation Agreement requires petitioner Christopher H. Lunding to pay alimony to his former spouse in the annual amount of $108,000.00, which alimony was in fact paid by Mr. Lunding in 1990. Mr. Lunding's former spouse was a resident of the State of Connecticut at all times in 1990.

11. On August 19, 1989, petitioner Christopher H. Lunding married petitioner Barbara J. Lunding at Greenwich, Connecticut. Since that date, petitioners have resided continuously at 276 Otter Rock Drive, Greenwich, Connecticut.

12. Prior to the issuance of the Notice of Deficiency, the Division issued to petitioners a Statement of Proposed Audit Changes. The statement indicated that:

> "A nonresident is not allowed the Federal deduction for alimony paid because it is not considered a deduction from income derived from New York sources. (Section 631[b][6] of the New York State Tax Law)."

The statement also provided a computation of tax due for the year 1990 based upon the disallowance of the deduction for alimony paid as follows:

"TAX PERIOD ENDED DATE: 12/31/90
TAX YEAR: 1990 FILE DUE DATE: 08/15/91
DATE RECEIVED: 07/30/91

FILING STATUS: 02

CORRECTED NEW YORK LINE 18:	$17,741.00
CORRECTED NEW YORK LINE 19:	$402,422.00
New York State Tax:	$56,487.00
Income Percentage:	.5106

Allocated New York State Tax:	$28,842.00
Tax Previously Stated/Adjusted:	$25,118.00
Additional Tax Due:	$3,724.00

Tax Per Taxpayer:	25,119.00
Tax Per Dept of Tax & Finance:	28,842.00
Timely Payments/Credits:	45,251.00
Late Payments:	0.00
Amount Previously Assessed/ Refunded:	20,133.00-
BALANCE:	3,724.00
Tax Amount Assessed:	3,724.00"

CONCLUSIONS OF LAW

A. Internal Revenue Code § 215(a) provides as follows:

> "GENERAL RULE—In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year."

B. Tax Law § 631(a) provides that the New York source income of a nonresident individual shall be the sum of the net amount of items of income, gain, loss and deduction entering into his Federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources. Tax Law § 631(b)(6) provides that the deduction allowed by Internal Revenue Code § 215, relating to alimony, shall not constitute a deduction derived from New York sources. There is no such provision of the Tax Law which disallows the deduction of alimony applicable to residents of New York State.

C. The background of Tax Law § 631(b)(6) is important to the development of the matter at hand, starting with *Matter of Friedsam v. State Tax Commn.* (98 AD2d 26, 470 NYS2d 848, *affd* 64 NY2d 76, 484 NYS2d 807). Mr. Friedsam was a Connecticut resident employed in New York State,

who claimed alimony payments to his former wife (also a Connecticut resident) as an adjustment to income on his nonresident tax return. In computing his New York adjusted gross income, Mr. Friedsam modified his Federal adjusted gross income so as to take credit for alimony paid only in the same proportion as was represented by the New York portion of his salary. The Division disallowed the deduction ruling that it did not relate to the production of New York income. Following an appeal, the former State Tax Commission concluded that alimony is not a deduction attributable to the petitioner's profession carried on in this State, within the meaning of Tax Law former § 632(b)(1)(B) and, therefore, not a proper adjustment to income in computing the petitioner's New York adjusted gross income. Special Term, Albany County, granted the petitioner's Article 78 application and held that because a resident is allowed alimony paid as an adjustment against income while a nonresident is not, the difference in treatment, without a substantial reason, was violative of the Privileges and Immunities Clause of the United States Constitution (US Const, art IV, § 2, cl 1). In affirming the judgment of Special Term, the Appellate Division, Third Department held the Division's contention, that the disparate treatment of nonresidents was justified by the personal nature of the alimony deduction, to be without merit.

The New York Court of Appeals affirmed the order of the Appellate Division, but did so upon statutory, not constitutional, grounds. The Court of Appeals held that the Division's disparate tax classification between resident and nonresident taxpayers is contrary to statute and tax policy of New York State. Mr. Friedsam sought an alimony deduction proportional to the ratio of his New York income derived from all sources. The amount by which he reduced adjusted gross income for his alimony payment was commensurate with the income derived from New York sources, and was consistent with the reduction allowed to residents under similar circumstances. The Court of Appeals concluded that the Division, in disallowing Mr. Friedsam's alimony deduction, had improperly

applied Tax Law former § 632(a)(1) and failed to apply Tax Law former § 635(c)(1) (apportionment of nonresident's itemized deductions). According to the Court, the passage of Tax Law former § 635(c)(1) reflected a policy decision that nonresidents be allowed the same non-business deductions as residents, but that such deductions be allowed to nonresidents in the proportion of their New York income to income from all sources.

D. Tax Law § 631(b)(6) was enacted by the Legislature as part of the Tax Reform and Reduction Act of 1987 (L 1987, ch 28, § 78). The main purposes of the Act were to conform State tax law to the Federal reforms effected by the Federal Tax Reform Act of 1986; return the resulting windfall to New York taxpayers; simplify the calculation of State taxes for most taxpayers; and change the system of taxation of nonresidents and part-year residents. In addition, the Act specifically provided that the deduction for alimony allowed by the Internal Revenue Code shall not constitute a deduction derived from New York sources.

Under Tax Law § 601(e), a nonresident individual computes his New York taxable income by first determining what the tax due would be if he were a resident individual and then by multiplying the tax shown as due by a fraction whose numerator is his New York source income and whose denominator is his Federal adjusted gross income. In computing the tax as if a resident and computing his Federal adjusted gross income, the individual has deducted alimony payments made to his ex-spouse. However, he cannot deduct such payments in computing his New York source income numerator since, under Tax Law § 631(b)(6), alimony paid by a nonresident is not considered a deduction derived from New York sources. This section specifically reversed *Friedsam v. State Tax Commn.* (*supra*). The effect of the allowance of the deduction in the base and the denominator and disallowance in the numerator is that the taxpayer cannot get the benefit of a proportional deduction of the alimony payments made to his ex-spouse (*see*, TSB-A-90[3]-I).

E. Petitioners contend that the denial of alimony as a deduction by Tax Law § 631(b)(6) violates the Privileges and Immunities Clause, the Commerce Clause and the Equal Protection Clause of the United States Constitution. It has been recognized that the jurisdiction of the Tribunal and the Division of Tax Appeals is prescribed by the enabling legislation (*Matter of Fourth Day Enterprises*, Tax Appeals Tribunal, October 27, 1988). This jurisdiction does not include a challenge that a statute is unconstitutional on its face (*see, e.g., Matter of Unger*, Tax Appeals Tribunal March 24, 1994; *Matter of Bucherer, Inc.*, Tax Appeals Tribunal, June 28, 1990; *Matter of Fourth Day Enterprises, supra*; *cf., Matter of J. C. Penney Co.*, Tax Appeals Tribunal, April 27, 1989 [holding that the issue of the constitutionality of the Tax Law as applied was properly before the Tribunal]). Therefore, petitioners' arguments are rejected because the liability asserted herein is based on the statute cited above and it is presumed that the statute involved is constitutional (*Califano v. Sanders*, 430 US 99; *Matter of Fourth Day Enterprises, supra*).

F. Petitioners contend that the principles of collateral estoppel and stare decisis are applicable to this matter in relation to *Friedsam v. State Tax Commn.* (*supra*).

Collateral estoppel[1] is a doctrine which is a narrower form of res judicata. In essence, it precludes a party from relitigating, in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (*Ryan v. New York Telephone Co.*, 62 NY2d 494, 478 NYS2d 823; *see generally*, Siegel, NY Prac § 443, at 673 [2d ed]).

In *Capital Telephone Co. v. Pattersonville Telephone Co.* (56 NY2d 11, 451 NYS2d 11), the Court of Appeals held that collateral estoppel (or its more modern name "issue preclusion") applies to administrative as well as judicial proceedings. This is true as long as the determination of the administrative agency was rendered pursuant to the adjudicatory authority of the agency to decide cases brought before its tribunal employing procedures substantially similar to those used in a court of law (*Staatsburg Water Co. v. Staatsburg Fire District*, 72 NY2d 147, 531 NYS2d 876). In either type of proceeding, requirements for application of the doctrine are: (1) that the issue as to which preclusion is sought be identical with that in the prior proceeding; (2) that the issue was necessarily decided in the prior proceeding; and (3) that the litigant who will be held precluded in the present matter had a full and fair opportunity to litigate the issue in the prior proceeding (*B. R. Dewitt, Inc. v. Hall*, 19 NY2d 141, 278 NYS2d 596). The courts have also held that the burden of establishing that the issue was identical and that the issue was necessarily decided in the prior proceeding is on the proponent of preclusion. As to the question of full and fair opportunity to contest the issue, the burden is on the party who opposes preclusion.

If the issue has not been litigated, there is no identity of issues between the present action and the prior determination (*Kaufman v. Lilly & Co.*, 65 NY2d 449, 492 NYS2d 584). For a question to have been actually litigated so as to satisfy the identicality requirement, it must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding (*Matter of Halyalkar v. Board of Regents*, 72 NY2d 261, 532 NYS2d 85; *Schwartz v. Public Admr. of County of Bronx*, 24 NY2d 65, 298 NYS2d 955; *Matter of Sterling Bancorp*, Tax Appeals Tribunal, November 18, 1993). In the instant case, petitioners challenge the validity of Tax Law § 631(b)(6). Clearly, the validity of Tax Law § 631(b)(6) was not actually litigated in the *Friedsam* case; thus, there is no identity of issue between the issue in the *Friedsam* case and the issue here.

In view of the fact that estoppel is an elastic doctrine, based on general notions of fairness involving a practical inquiry

[1] Since stare decisis is a policy of adherence to decided cases, which is what is sought by petitioners in their collateral estoppel defense, for purposes of this matter only the applicability of collateral estoppel shall be considered herein.

into the realities of litigation (*Matter of Halyalkar v. Board of Regents, supra*), the principles of which are not to be applied in a mechanical fashion (*Staatsburg Water Co. v. Staatsburg Fire Dist., supra*) and that the use of the doctrine "offensively" by a nonparty in the prior litigation (here, petitioners) in some cases raises legitimate concerns about the fairness of its application (*Matter of Halyalkar v. Board of Regents, supra*), it is concluded that because the validity of Tax Law § 631(b)(6) was not challenged in the *Friedsam* case, the doctrine is not applicable in this case.

G. The petition of Christopher H. and Barbara J. Lunding is denied.

DATED: Troy, New York
APR 28 1994

/s/ THOMAS C. SACCA
ADMINISTRATIVE LAW JUDGE